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No. 88-1146

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RALPH NADER, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT-INTERVENOR UNIROYAL CHEMICAL COMPANY, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that the petitioners failed to avail themselves of the existing judicial review procedures contained in the pesticide tolerance-setting provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 346a(i) and 348(g) (1982 & Supp. IV 1986).

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STATEMENT OF THE CASE

A comprehensive statement of the case is contained in the decision of the court of appeals. (Pet. App. 1-19).

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct and does not raise important issues that need to be addressed by this Court. The Ninth Circuit's decision does not conflict with *Florida Power & Light Co. v. Lorion*, 470 U.S.

729 (1985), or with the decision of any other circuit court of appeals.

1. This case does not have broad implications: It is confined to the question of whether petitioners complied with the jurisdictional prerequisites of two narrow appellate review provisions of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 346a(i) and 348(g) (1982 & Supp. IV 1986). The court of appeals did not purport to establish general principles of appellate review governing the denial of rulemaking petitions and it would be unwarranted to read any such general principles into the court's decision.

2. The facts of this case do not merit the issuance of a writ of certiorari. Petitioners claim that their purpose was to have EPA initiate a proceeding to revoke the tolerance regulations for daminozide (Petition for Writ of Certiorari at 4). Yet petitioners had the power to initiate such a tolerance-revocation proceeding, as the court of appeals pointed out, simply by filing objections to the daminozide tolerance regulation published on January 16, 1987, or by filing objections to EPA's denial of their rulemaking petition. Pet. App. 16. Had petitioners taken either of these steps, they could have obtained judicial review in the court of appeals as a matter of right under §§ 346a(i) and 348(g). Even if EPA had not published a § 346a tolerance regulation on daminozide, petitioners could have obtained judicial review of the denial of their rulemaking petition in the district court under the Administrative Procedure Act, 5 U.S.C. § 706 (1982).[1] Most recently, the tolerance regulation for daminozide was extended on January 31, 1989 (54 Fed. Reg. 6392) affording petitioners another opportunity

[1] The other statute regulating pesticides, the Federal Insecticide, Fungicide and Rodenticide Act, also divides judicial review functions between the court of appeals and district court: Orders following a public hearing are reviewable in the court of appeals, and other final agency action not following a hearing is reviewable in the district court. 7 U.S.C. § 136n (1982 & Supp. V 1987).

to file objections and thereafter obtain review in the court of appeals. Thus petitioners had several avenues available to obtain judicial review of the daminozide tolerances, but they repeatedly refused to avail themselves of those existing remedies under §§ 346a(i) and 348(g) or under the Administrative Procedure Act. Although petitioners apparently would prefer to have a right of direct appellate review from the denial of their rulemaking petition, that is not how §§ 346a(i) and 348(g) are written. Petitioners' desire to recast these jurisdictional provisions in a manner more to their liking is not a sufficient reason for review by this Court.

3. The Ninth Circuit's decision does not conflict with *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985). The scope of appellate review in specialized statutes like the FDCA is highly dependent upon the precise language Congress used. Because the review provisions of the FDCA at issue here are different in critical respects from the provisions of the Atomic Energy Act at issue in *Florida Power*, the Ninth Circuit's decision is not in conflict with *Florida Power*.

Section 346a(i)

The jurisdictional provision of the Atomic Energy Act ("AEA") construed in *Florida Power* provided for review of orders entered in "any proceeding" for the granting or amending of a license. 470 U.S. at 733. However, the version of the AEA that preceded the final legislative language quoted above restricted court of appeals review to orders "granting, denying, suspending, revoking, modifying, or rescinding any license . . . ." *Id.* at 738. The difference between the two versions was highly significant. Review of an order entered in "any proceeding" for the granting of a license was held to encompass the denial of a petition to revoke a license (*id.* at 741); but review of an "order granting, denying" or modifying a license was found *not* to encompass the

denial of a petition to revoke a license ("those seeking to challenge Commission decisions *not* to suspend, revoke, or amend could not obtain initial court of appeals review"). *Id.* at 738.

Section 346a(i) is comparable to the *predecessor* version of the AEA, not to the *final* statutory language. Section 346a(i) allows review of orders under § 346a(e) (1982) "establishing a tolerance . . . ." Section 346a(i) thus presupposes that an order has been entered granting (or revoking or amending) a tolerance regulation. It is considerably more restrictive than the AEA review provision construed in *Florida Power* that provides appellate court jurisdiction for orders entered "in any proceeding" for the granting or amending of a license.

This conclusion is supported by the language of § 346a. Although § 346a(i) allows review of regulations establishing tolerances under § 346a(e), the latter subsection states that tolerance regulations issued under § 346a(e) are subject to the procedures set forth in § 346a(d) (1982). Under § 346a(d)(5) an appealable order arises only when the agency "shall . . . by order make public a regulation." Thus, § 346a(i), unlike the review provision of the AEA construed in *Florida Power*, contemplates that for an order to be reviewable in the court of appeals, it must result in the issuance (or revocation or amendment) of a tolerance regulation. The denial of a rulemaking petition to revoke a tolerance regulation does not constitute an "order mak[ing] public a regulation" and is not reviewable in the court of appeals under § 346a(i).

Section 348(g)

Section 348(g), unlike § 346a(i), *does* authorize court of appeals review of the denial of a petition to revoke a tolerance, but only if the petitioner first observes the procedural prerequisites set forth in § 348f(1): filing objections which lead to a public hearing and an appeal-

able order. There is no ambiguity in § 348f(1) (as there was in the AEA) as to the necessity to comply with procedural requirements. In this respect, review under § 348(g) is very different from review under the AEA: Section 348(g) explicitly ties appellate review to compliance with procedural prerequisites, while the AEA does not. 470 U.S. at 739. For this reason, too, the Ninth Circuit's decision on the prerequisites for review under § 348(g) does not conflict with the holding in *Florida Power*.

Looking beyond §§ 348(g) and 346a(i), it becomes clear that the same pattern of appellate review appears throughout the FDCA: Whenever the FDCA allows court of appeals review of an order, that order is always the product of an administrative proceeding. *See, e.g.*, 21 U.S.C. § 355(h) (1982 & Supp. IV 1986) (new drugs); § 360b(h) (1982) (new animal drugs); § 360g (1982) (medical devices); § 376(d) (1982) (color additives) (referring to § 371(f) (1982). Direct appellate review from the denial of a petition to revoke a regulation is not authorized in any FDCA review provision of which we are aware.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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